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How Would the Supreme Court Decide *Loving* and *Ridgely*?

By Steve R. Johnson


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In this article, Johnson maintains that *Brohl*, a recent Supreme Court decision, supports the rationales of the *Loving* and *Ridgely* decisions. Those rationales may well be asserted in future cases seeking to invalidate portions of Circular 230. That being so, the Supreme Court's apparent approach may prove to be significant.

A. Introduction

On March 3 the Supreme Court unanimously decided *Direct Marketing Association v. Brohl*,[1] a case arising under the Tax Injunction Act (TIA).[2] The focus of this article is not on *Brohl* on its own terms but on the implications of *Brohl* for the *Loving* line of cases and for future cases that may arise out of *Loving*. I believe *Brohl* reveals that the Supreme Court would likely uphold the approach taken in *Loving* were a case of this kind to reach the Court. For that reason, the government was wise not to seek Supreme Court review of *Loving*. Unless it can persuade Congress to amend the relevant statute,[3] the government may need to use different arguments in post-*Loving* cases.

There can be few tax professionals who have not heard of *Loving*[4] and *Ridgely*.[5] These cases invalidated portions of Circular 230[6] that had gone beyond the regulatory authority conferred on Treasury by the enabling act: 31 U.S.C. section 330. *Loving* invalidated portions of Circular 230 imposing mandatory testing and continuing education conditions on previously largely unregulated tax return preparers.[7] *Ridgely* invalidated a portion of Circular 230 that prohibited contingent fees for preparing ordinary tax refund claims.[8]

Loving was decided by the federal district court for the District of Columbia, unanimously affirmed by a three-judge panel of the D.C. Circuit. The government chose not to seek further judicial review: It chose not to seek *en banc* consideration by the D.C. Circuit, and it chose not to seek certiorari review by the Supreme Court. *Ridgely* was decided by the same federal district court, largely on the strength of *Loving*. Again, the government chose not to seek further judicial review.[9]

Two sets of questions arise from that history: (1) What would have happened had the government sought and obtained further judicial review? Would it likely have won or lost? and (2) Is the first question driven by anything more than mere intellectual curiosity? Are *Loving* and *Ridgely* now closed books, or do they have significance in other contexts?

B. Why the *Loving*/*Ridgely* Rationales Matter

Starting with the second question, the answer is that *Loving* and *Ridgely* do matter. If the rationales of those cases stand, and unless the government can successfully use other statutory delegations that were not at issue in *Loving* and *Ridgely*, other portions of Circular 230, portions not directly at issue in those cases, may be in danger of invalidation.

The government emphasized 31 U.S.C. section 330(a) as the statutory foundation for the Circular

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[1]135 S. Ct. 1124 (2015), *rev'g* 735 F.3d 904 (10th Cir. 2013).

[2]28 U.S.C. section 1341.

[3]*See* Amy S. Elliott, "New Legislative Fix to *Loving*, *Ridgely* on Horizon, Hawkins Says," *Tax Notes*, Apr. 6, 2015, p. 38.

[4]*Loving v. IRS*, 917 F. Supp.2d 67 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

[5]*Ridgely v. Lew*, 2014 WL 3506888 (D.D.C. July 16, 2014).

[6]Treasury regulations setting out rules governing practice before the IRS, popularly known as Circular 230, are in 31 C.F.R. subtitle A, pt. 10.

[7]31 C.F.R. sections 10.3(f), 10.4(d), 10.5, 10.6(d)(2), 10.6(e)(2), and 10.6(f) (as then in effect).

[8]31 C.F.R. section 10.27(b) (as then in effect).

[9]"The government declined to appeal *Ridgely* since it would have been heard in the same court that decided *Loving*." Elliott, *supra* note 3 (citing Karen Hawkins, director of the IRS Office of Professional Responsibility).

230 rules at issue in *Loving* and *Ridgely*. That provision empowers Treasury to regulate the practice of taxpayer representatives before it, and before admitting a representative to practice, to require that the representative establish good character, good reputation, necessary qualifications, and "competency to advise and assist persons in presenting their cases."[10]

Loving and *Ridgely* held that this language gives Treasury the authority to regulate only the actions of those representing the taxpayer before the IRS. Under a plain language analysis supported by analysis of statutory context, the courts found that return preparation and ordinary refund claim preparation do not involve the preparer acting as the taxpayer's agent, being able to bind the taxpayer in dealings with the IRS (thus, the preparer is not a representative within the meaning of the statute).[11] They also found that returns and claims preparation occur before a case has arisen between the taxpayer and the IRS (thus, the preparer is not engaged in practice before the IRS within the meaning of the statute).[12]

That reasoning does not apply exclusively to preparing returns and ordinary refund claims. The reasoning, if it stands, could apply to other taxpayer-adviser interactions occurring before contact with the IRS. For example, Treasury has often amended the Circular 230 rules regarding tax opinions.[13] Because tax opinions usually are written and delivered before taxpayer-IRS contact, do the *Loving/Ridgely* rationales raise the possibility that these rules too may outstrip 31 U.S.C. section 330 and thus be invalid?[14]

At this point, one cannot definitively say that this and other Circular 230 rules are doomed. *Loving* interpreted 31 U.S.C. section 330(a). In future cases involving different facts, Treasury may get mileage out of other parts of section 330[15] or out of statutes other than section 330.[16] And Congress always has the power to end the controversy by amending section 330 to confer on Treasury the authority that the *Loving* and *Ridgely* courts concluded had not been delegated by section 330(a).

While we cannot at this juncture speak with certitude, it is fair to say that if the *Loving/Ridgely* rationales stand, one must take seriously the possibility of invalidation of other portions of Circular 230 still on the books. An administrative action cannot stand on the basis of sound policy and good intentions alone. The courts have made clear that federal agencies have the power to act only to the extent that Congress has conferred that power on them by statute. A regulation is invalid if it goes beyond the statutory delegation.[17]

C. *Brohl*'s Impact on *Loving* and *Ridgely*

If the *Loving/Ridgely* rationales are correct, other parts of Circular 230 may be built on sand. *Loving* and *Ridgely* were correctly decided, I believe, although more because of the representative rationale than the practice rationale.[18] *Brohl* did not cite *Loving* and *Ridgely*. Still, the analytical approach *Brohl* used is strongly reminiscent of the approach of *Loving* and *Ridgely*. Thus, *Brohl* suggests that the Supreme Court likely would have affirmed *Loving* had the government sought and obtained certiorari. The Supreme Court's endorsement in *Brohl* of the *Loving/Ridgely* approach adds weight to the possibility that future cases may invalidate other parts of Circular 230 on the basis of the *Loving* rationales.

1. *Brohl*, described. Because of the Supreme Court's *National Bellas Hess* and *Quill* decisions, a state may not compel a retailer that has no physical presence in the state to collect sales or use tax on purchases by residents of the state.[19] That inability — coupled with the widespread disinclination of purchasers to self-assess and pay use taxes — creates significant

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[10]31 C.F.R. section 330(a)(1) and (2).

[11]*Loving*, 742 F.3d at 1016-1017 ("tax-return preparers are not agents. They do not possess legal authority to act on the taxpayer's behalf.").

[12]*Id.* at 1018 ("to practice before a court or agency ordinarily refers to practice during an investigation, adversarial hearing, or other adjudicative proceedings. . . . Not until a return is selected for an audit, or the taxpayer appeals the IRS's proposed liability adjustments" can "practice before the IRS" exist.).

[13]*See, e.g.*, Christopher Rizek, "Recent Changes in Circular 230: Where Are We Now?" 30 *Tax Man. Real Est. J.* 299 (2014).

[14]For discussion of that and other possibilities, see Johnson, "How Far Does Circular 230 Exceed Treasury's Statutory Authority?" *Tax Notes*, Jan. 12, 2015, p. 221; *see also* Elliott, *supra* note 3 (quoting professor Michael Doran's view that under *Loving* and *Ridgely*, "most of Circular 230 is invalid when applied outside the tax controversy context" and quoting the partly similar views of Rizek).

[15]Such as subsection (b) or (d) of 31 U.S.C. section 330. Those possibilities are explored in Johnson, *supra* note 14, subparts VB2 and VB3. *But see* Jamie P. Hopkins, "*Loving v. IRS*, The IRS's Achilles Heel for Regulated Tax Advice?" 34 *Va. Tax Rev.* 191 (2014) (questioning the viability of the section 330(d) option).

[16]*See, e.g.*, Elliott, *supra* note 3 (quoting professor Bryan Camp's view that section 7805 might be enlisted for that purpose). Section 7805(a) authorizes Treasury to "prescribe all needful rules and regulations for the enforcement of" the code. Hawkins has doubts about that approach, as do I. *See id.*

[17]*E.g., Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress").

[18]Johnson, "*Loving* and Legitimacy: IRS Regulation of Tax Return Preparation," 59 *Vill. L. Rev.* 515 (2014).

[19]*Quill Corp. v. North Dakota*, 504 U.S. 298, 315-318 (1992); *National Bellas Hess Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753, 758 (1967).

revenue losses for states, and increasingly so as the Internet siphons business away from brick-and-mortar stores.

Colorado responded to that by requiring retailers that do not collect sales and use taxes to notify purchasers of their duty to pay use tax and to identify large Colorado purchasers to the Colorado Department of Revenue.[20] A direct marketing trade association brought suit in federal district court challenging those provisions as violating the commerce clause. The district court found the challenge meritorious and permanently enjoined enforcement of the statutory regime.[21] The Tenth Circuit reversed without addressing the constitutional merits of the case. The circuit court concluded that under the TIA, the district court lacked jurisdiction to hear the case.[22]

Enacted in 1937, the TIA provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." The TIA was modeled on an older statute well-known to federal tax practitioners: the Anti-Injunction Act (AIA).[23] The Court assumes that "words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code."[24]

The Supreme Court reversed and remanded *Brohl* to the Tenth Circuit. Justice Clarence Thomas wrote for the Court. Justice Anthony M. Kennedy filed a concurring opinion, stating, "The opinion of the Court has my unqualified join and assent, for in my view it is complete and correct."[25] He wrote separately to urge that *National Bellas Hess* and *Quill* be overturned at the first available opportunity. Justice Ruth Bader Ginsburg, joined in essential part by Justices Stephen G. Breyer and Sonia Sotomayor, also filed a concurring opinion.

2. Significance of *Brohl*. Obviously, a holding on the TIA (*Brohl*) is not a holding on 31 U.S.C. section 330 (*Loving* and *Ridgely*). Moreover, the Supreme Court often changes tack from case to case, spurning today (usually via disingenuously distinguishing) what it had embraced yesterday. Despite all that, *Brohl* seems to have used in the TIA context the same approach that *Loving* and *Ridgely* used in the Circular 230 context. If courts hearing future Circular 230 cases read *Brohl* in this way, the hazard to other portions of Circular 230 may grow.

a. The approach of *Loving* and *Ridgely*. *Loving* and, derivatively, *Ridgely* reached their results through a particular method. *Brohl* used essentially the same method. *Loving* and *Ridgely* were *Chevron* cases.[26] In the past, some courts applied *Chevron* leniently. That is, they were willing to infer a delegation to the agency because they treated strained possibilities as sufficient ambiguity to escape step one. Thus, they could move quickly onto the reasonableness standard of step two, a standard easier for an agency to satisfy.[27]

Loving and *Ridgely* were not cut from that cloth. They reflect the dominant contemporary trend of far more robust review.[28] The approach taken by *Loving* and *Ridgely* was exacting, textual, and categorical. Exacting because the decisions demanded that to be upheld, the regulations had to be traced to a particular statutory delegation. Textual because the language of the statute purportedly providing the delegation was taken seriously (although in context, not in isolation). Categorical because the agency's action had to fit within the categories made relevant by the statutory language, instead of merely having some possible effect on them.[29]

The decisions emphasized that in every case, the question is whether the agency is acting under authority delegated to it by Congress.[30] The purported delegation in those cases was section 330(a), the terms of which authorized Treasury to regulate representatives engaged in practice before the agency.

In analyzing whether the return preparer regulations fit within those statutorily established categories, the *Loving* district court offered its conception

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[20]Colo. Rev. Stat. section 39-21-112 (3.5).

[21]*Direct Marketing Association v. Huber*, 2012 WL 1079175 (D. Colo. Mar 30, 2012).

[22]*Brohl*, 735 F.3d 904.

[23]Section 7421(a) (providing, with statutory and case law exceptions, that "no suit for the purpose of restraining the assessment or collection of any [federal] tax shall be maintained in any court by any person").

[24]*Brohl*, 135 S. Ct. at 1129 (citing *Hibbs v. Winn*, 542 U.S. 88, 110-105 (2004)).

[25]135 S. Ct. at 1134 (Kennedy, J. concurring).

[26]*See Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

[27]Other courts, however, have treated both steps of *Chevron* rigorously; *see* Johnson, "Preserving Fairness in Tax Administration in the *Mayo* Era," 32 *Va. Tax Rev.* 269, 287 (2012) (discussing the authorities).

[28]That trend parallels increased rigor in judicial review of agency actions under the "arbitrary and capricious" standard. *E.g.*, *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Am. Equity Inv. Life Ins. Co. v. SEC*, 572 F.3d 923 (D.C. Cir. 2010). *See generally* Thomas J. Miles and Cass R. Sunstein, "The Real World of Arbitrariness Review," 7 *U. Chi. L. Rev.* 761, 761-763 (2008); Kathryn A. Watts, "Proposing a Place for Politics in Arbitrary and Capricious Review," 119 *Yale L.J.* 2, 15-23 (2009) (describing the history of "hard look" review).

[29]For additional discussion, see Johnson, *supra* note 18, at 528-530.

[30]*Loving*, 742 F.3d at 1017 and 1021 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2012)).

of the steps of tax determination and collection. It saw three phases: assessment and collection, examination, and appeals. In the first phase, taxpayers file their returns, the IRS assesses the liabilities reported on those returns, and the IRS deposits the tax remitted by the taxpayer. In the second phase, the IRS examines some filed returns, during which the examined taxpayer may have a representative. The third phase consists of the administrative and judicial processes to resolve any disagreements that arise during the examination.[31]

b. The approach of *Brohl*. Interpreting the TIA in light of the AIA, the *Brohl* Court remarked that "the Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection."[32] That might seem inconsistent with *Loving*, which, as seen above, identified assessment as the first phase of the process,[33] but the difference is easily explained. Generally, federal tax assessments come at two different points.[34] The first is assessment of amounts reported by taxpayers on their returns; the second is so-called deficiency assessment of additional liabilities determined by the IRS beyond amounts reported on the returns. *Loving* was thinking of the former (in which assessment precedes IRS information gathering); *Brohl* contemplated the latter (in which IRS information gathering precedes assessment).

The *Brohl* opinion had two principal aspects, relevant to our discussion here. First, it defined the stages of the tax process made relevant by the statute. Second, it insisted that for the statute to apply, the government action must fit within one or another of those categories, rather than merely affecting one generally or indirectly. That approach was the approach taken by *Loving* and *Ridgely*, too.

i. Relatively precisely cabined statutory categories. The *Brohl* Court noted that the terms used by the TIA — assessment, levy, and collection — "refer to discrete phases of the taxation process."[35] The issue in *Brohl* was whether a suit challenging the informational notices and information reporting mandated by the Colorado statute interfered with the assessment, levy, or collection of Colorado's sales and use taxes. In holding that it did not, *Brohl* distinguished notice and reporting from all three of those categories.

Assessment: According to the *Brohl* Court, "assessment" means "a 'recording' of the amount that the taxpayer owes the Government."[36] "It might also be understood more broadly to encompass the process by which that amount is calculated."[37]

In the view of the *Brohl* Court, the notice and reporting actions commanded by the Colorado statute fall outside both of those meanings. "Even understood more broadly, 'assessment' has long been treated in the Tax Code as an official action taken based on information already reported to the taxing authority. . . . Assessment was understood as a step in the taxation process that occurred after, and was distinct from, the step of reporting information."[38]

Levy: "Levy" appears in the TIA but not in the AIA. Accordingly, the *Brohl* Court noted the meaning of the term in section 6331 ("a specific mode of collection under which the [IRS] distrains and seizes a recalcitrant taxpayer's property"[39]) and in contemporary dictionaries ("the legislative function of laying or imposing a tax and the executive functions of assessing, recording, and collecting the amount a taxpayer owes"[40]). In the Court's view, notifying taxpayers of use tax obligations and providing information reports on consumers fit none of those meanings.[41]

Collection: The *Brohl* Court defined collection as "the act of obtaining payment of taxes due,"[42] a "part of the enforcement process that assessment sets in motion,"[43] or more broadly as encompassing "the receipt of a tax payment before a formal assessment occurs."[44] But again, in any of those senses, "'collection' is a separate step in the taxation process from assessment and the reporting on which assessment is based."[45]

ii. Integral, not merely influential, relation. As seen above, the *Brohl* Court did not see informational notices and reporting as being either assessment, levy, or collection. Perhaps the TIA might still bar the suit if the former are sufficiently connected to the latter.

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[31] *Loving*, 917 F. Supp.2d at 69-70.

[32] 135 S. Ct. at 1129.

[33] *See* 917 F. Supp.2d at 69.

[34] Assessments can come at other points as well, see, *e.g.*, sections 6851-6862 (jeopardy, termination, and related assessments), but the two avenues described above account for the majority of assessments.

[35] 135 S. Ct. at 1129.

[36] *Id.* at 1130 (quoting *Hibbs*, 542 U.S. at 100); *see* section 6203.

[37] 135 S. Ct. at 1130; *see also United States v. Galletti*, 541 U.S. 114, 122 (2004).

[38] 135 S. Ct. at 1130.

[39] *Id.*

[40] *Id.* (citing *Black's Law Dictionary* 1093 (1933) and *Webster's New International Dictionary* 1423 (1939)).

[41] 135 S. Ct. at 1130.

[42] *Id.* (citing *Black's Law Dictionary*, *supra* note 40, at 349).

[43] 135 S. Ct. at 1130 (quoting *Hibbs*, 542 U.S. at 102, n.4) (punctuation marks omitted).

[44] 135 S. Ct. at 1131.

[45] *Id.*

Colorado essayed that argument, portraying the provisions at issue as, if not assessment and collection themselves, at least "part of the process" leading to assessment and collection.[46] That was not enough. The Court demanded more than mere influence. "Enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from customers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes."[47]

The Tenth Circuit offered a statutory basis for an "influence is enough" argument. The TIA generally provides that the federal court may "not enjoin, suspend or restrain" the assessment, levy, or collection of state taxes. Recognizing the disjunctive language and finding "restrain" to be the most flexible term, the Tenth Circuit adopted a broad definition of it. It concluded that the TIA precludes any suit that would "limit, restrict, or hold back" assessment, levy, or collection.[48]

The Supreme Court rejected that broad approach. The Court acknowledged that "restrain," standing alone, is susceptible to several interpretations. To resolve the ambiguity, the Court invoked[49] the contextual approach of *Robinson v. Shell Oil Co.*,[50] which *Loving* also had done.[51] On several grounds — including the technical nature of the statutory language, the "words are known by the company they keep" canon, and the "no surplusage" canon — the Court concluded that restrain should be understood narrowly, as "prohibition," rather than "mere inhibition."[52]

The Court, in choosing the strict standard of fit, twice invoked "our rule favoring clear boundaries in the interpretation of jurisdictional statutes."[53] Defining restrain as "stop" provides a clear rule, while defining it as "merely inhibit to some degree" would produce "a vague and obscure boundary that would result in both needless litigation and uncalled-for dismissal."[54] 31 U.S.C. section 330 also is a jurisdictional provision, so it would presumably be subject to the same interpretational principle.

iii. Concurring opinions. The foregoing emphasized the majority opinion in *Brohl*. The concurring opinions do not suggest any likely defectors were the Court to hear a section 330 case. Justice Kennedy unqualifiedly joined the majority's "complete and correct" opinion.[55]

Justice Ginsburg's concurrence, which Justice Breyer joined in full and Justice Sotomayor joined in part, noted that the plaintiff, Direct Marketing Association, was "not challenging its own or anyone else's tax liability or tax collection responsibilities. . . . A different question would be posed . . . by a suit to enjoin reporting obligations imposed on a taxpayer or tax collector."[56] Neither *Loving* nor *Ridgely* involved a direct taxpaying or tax collecting obligation, nor would most possible future cases involving challenges to other portions of Circular 230.

D. Next Steps: Litigation and Legislation

1. Litigation. When will the courts have an opportunity to address what, if anything, *Brohl* has to say about the validity of the *Loving/Ridgely* approach? In addition to other cases that may come down the pike, the ongoing *Steele/Dickson* and *Sexton* cases bear watching.

a. *Steele/Dickson*. Federal agencies are authorized to charge service fees under defined circumstances.[57] As here relevant, tax return preparers pay initial and annual fees to obtain required preparer tax identification numbers.[58] In *Brannen* in 2012, the Eleventh Circuit upheld the PTIN initial fee.[59] In *Buckley* in 2013, a district court of the Eleventh Circuit upheld the PTIN annual fee.[60] But *Brannen* preceded both *Loving* and *Ridgely*, and *Buckley* (which was decided after the *Loving* district court decision) obviously felt constrained by *Brannen*.

Opponents of the PTIN fees have renewed their assault, but this time in cases filed in the D.C.

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[46] *Id.*

[47] *Id.*

[48] 735 F.3d at 913.

[49] *Brohl*, 135 S. Ct. at 1132.

[50] 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

[51] 917 F. Supp.2d at 74.

[52] *Brohl*, 135 S. Ct. at 1132-1133; *see also id.* at 1133 ("a suit cannot be understood to 'restrain' the 'assessment, levy, or collection' of a state tax if it merely inhibits those activities"). For discussion of the referenced canons, see Johnson, "The 'Things of the Same Nature' Canon in State Tax Construction," *State Tax Notes*, Jan. 7, 2013, p. 59; Johnson, "The 'No Surplusage' Canon in State and Local Tax Cases," *State Tax Notes*, Sept. 17, 2012, p. 793.

[53] *Brohl*, 135 S. Ct. at 1131, 1133; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

[54] 135 S. Ct. at 1133 (quoting *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment)) (quotation marks omitted).

[55] 135 S. Ct. at 1134.

[56] *Id.* at 1136.

[57] 31 U.S.C. section 9701.

[58] Section 6109; reg. section 1.6109-2(d).

[59] *Brannen v. United States*, 682 F.3d 1316 (11th Cir. 2012). Although upholding the fee generally, the Eleventh Circuit noted that the plaintiff had not raised, so the court did not decide, whether the amount of the fee was excessive. *Id.* at 1317, n.1.

[60] *Buckley v. United States*, 2013 WL 7121182 (N.D. Ga. 2013).

district, first in *Steele*,[61] then in *Dickson*.[62] Both are class actions, and the cases seem likely to be consolidated once the court selects which competing set of lawyers will be class counsel.[63]

The presence of a non-code statute, 31 U.S.C. section 9701, blurs the focus of *Steele/Dickson*. Still, *Loving* is a big part of the plaintiffs' argument. *Steele/Dickson* may, therefore, be an occasion for considering the effect of *Brohl* on *Loving*.

b. *Sexton*. James C. Sexton is a tax adviser and return preparer. He is under investigation for possible violation of Circular 230, under which the IRS sought production of documents of his and other information. Claiming that he is not a practitioner before the IRS, Sexton brought an action in the federal district court in Nevada. The district court (1) denied the government's motion for summary judgment, (2) ordered that Sexton is not required to produce the information during the pendency of the case, and (3) directed the IRS and the Office of Professional Responsibility not to suspend or curtail Sexton's ability to electronically file returns for his clients.[64]

In December 2014 the government filed an interlocutory appeal, asking the Ninth Circuit to reverse the district court's order. The Ninth Circuit might resolve the case without squarely addressing *Loving* and *Ridgely*. If it does address those cases, however, the court and the parties would have the opportunity to explore the effect of *Brohl*.

Sexton is potentially important. Given *Loving* and *Ridgely*, those challenging other portions of Circular 230 or related rules have an incentive to bring their cases in the D.C. district court.[65] That is where *Steele* and *Dickson* were brought. It is also where the American Institute of Certified Public Accountants brought its thus far ill-fated suit challenging the IRS's voluntary program that replaced the mandatory program invalidated in *Loving*.[66] *Sexton* would be the first opportunity for a circuit other than the D.C. Circuit to express its views on *Loving* and *Ridgely*.

2. Legislation. In March OPR Director Karen Hawkins stated that "new legislative proposals to shore up the IRS's authority to regulate paid return preparers should be out in the very near future."[67] But the government must use care in writing that legislative fix.

A statutory amendment that does no more than reverse *Loving* and *Ridgely* — such as the one-sentence legislative fix proposed by one commentator[68] — would change their particular results but could leave their rationales intact.[69] Reinforced by *Brohl*, those rationales could spell defeat for the government in future Circular 230 cases outside the ambit of the corrective legislation.

E. Conclusion

Brohl does not squarely endorse *Loving* and *Ridgely*. However, *Brohl* took an approach strikingly similar to the approach of those cases. Both those cases and *Brohl* involved a tight definition of the relevant phases of the tax administration process, and they all demanded that the action in question fit within the statutory terms rather than allowing as sufficient some loose possibility of mere influence on the statutorily relevant concepts. Moreover, the principle of preferring clear boundaries for jurisdictional statutes invoked by *Brohl* provides an additional rationale not offered in *Loving* and *Ridgely* but which is felicitous to their holdings.

Brohl's methodological endorsement of *Loving* and *Ridgely* is potentially significant for future Circular 230 cases, whether *Steele/Dickson*, *Sexton*, or another suit. *Brohl*'s reinforcement of the *Loving* and *Ridgely* rationales should be taken into account by Treasury and its legislative allies in writing legislation to amend Circular 230 to augment Treasury's regulatory authority.

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[61]*Steele v. United States*, No. 1:14-cv-01523.

[62]*Dickson v. United States*, No. 1:14-cv-02221.

[63]For a description of the issues and the cases, see Plaintiff's Memorandum in Support of their Motion for Consolidation of Related Actions and Appointment of Motley Rice LLC as Interim Class Counsel, *Steele v. United States* and *Dickson v. United States*, Nos. 1:14-cv-01523-RCL and 1:14-cv-02221-RCL (Feb. 5, 2015), 2015 WL 917029 (2015).

[64]*Sexton v. Hawkins*, 114 AFTR2d 6482 (D. Nev. 2014).

[65]In general, that court may hear challenges to the validity of the regulations of all federal agencies, including Treasury and the IRS. *See* 28 U.S.C. section 1391(e).

[66]*American Institute of Certified Public Accountants v. IRS*, 2014 WL 5585334 (D.D.C. filed July 15, 2014) (granting the government's motion to dismiss for lack of standing), *appeal filed*, No. 14-5309 (D.C. Cir. Dec. 9, 2014).

[67]Quoted by Elliott, *supra* note 3. *But see* Alex H. Levy, "Believing in Life After *Loving*: IRS Regulation of Tax Preparers," 17 *Fla. Tax Rev.* 437, 470 (2015) (doubting the political feasibility of legislative correction).

[68]*See* Levy, *supra* note 67, at 468.

[69]*See id.* (citing Doran's observation that a bill introduced by Sen. Ron Wyden, D-Ore., "would effectively overturn *Loving* [but] would leave the court's reasoning in the case untouched"); *see also id.* (quoting Rizek that the Wyden proposal is "just a little tweak" and is "not the way to go").